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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Estate of Daniel Guggenheim, deceased,

FLORENCE GUGGENHEIM, Executrix,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

Dated, New York, N. Y., June 5, 1941.

THE COURT PRESS, N. Y. C.

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FLORENCE GUGGENHEIM, Executrix,

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Estate of Daniel Guggenheim, Florence Guggenheim, Executrix, petitions for a writ of certiorari to review the decision of one of the issues decided adversely to it by the Circuit Court of Appeals for the Second Circuit in its judgment entered on March 6, 1941, which affirmed a decision of the United States Board of Tax Appeals entered on September 14, 1939, sustaining a deficiency in Federal estate taxes asserted by the Commissioner of Internal Revenue. The remaining issues in the case are not affected by the decision on the question here presented.

The Nature of the Proceeding.

Daniel Guggenheim, the decedent, died testate on September 28, 1930, a resident of Nassau County, New York

(R. 43). Between 1917 and 1925 decedent, as settlor, executed four trust instruments with the Commercial Trust Company of New Jersey, as trustee, of which the agreement dated October 29, 1917 and executed on May 28, 1918 (Ex. 8, R. 198), and the agreement of February 14, 1922 (Ex. 9, R. 211) are alone material. In its finally operative form, the trust agreement provided for a life income for Robert, the son of the decedent, and remainders in trust for the children of the decedent's son and their descendants or appointees, all subject to powers reserved to the decedent to alter, modify and prescribe the proportionate shares of the respective beneficiaries. The power of revocation was expressly relinquished, and by express language the powers reserved excluded any power "to frustrate the essential purposes of the trust of making provision for the son of the Settlor and his children or descendants" (R. 123-129).

The Commissioner of Internal Revenue included the entire value of the trust ($2,290,155.62 at the date of death) (R. 155) in decedent's gross estate. Certain other adjustments were made in the estate tax return not here material. The Board of Tax Appeals sustained the Commissioner's action in respect to the issue here involved and the Circuit Court of Appeals for the Second Circuit affirmed.

The Question Presented.

We concede that the value of Robert's life interest should be included in the gross estate. The narrow question presented is whether the value of the remainder interest is includible under Section 302(d) of the Revenue Act of 1926.

Summary Statement of Matter Involved.

The facts with respect to this issue are stipulated (R. 183-186).

On October 29, 1917, decedent created a revocable trust for the benefit of his son, Meyer Robert Guggenheim, and the child or children of Robert (Ex. 7, R. 187). This trust was revoked, cancelled and superseded by a trust agreement entered into with the Commercial Trust Company of New Jersey, as trustee, on May 28, 1918 (Ex. 8, R. 198). This trust provided for the payment of an annual income of $21,000 to decedent's son, Robert, for a period of 10 years. At the expiration of 10 years, or at the time of any earlier termination, the trust was to terminate and the corpus to be paid over to Robert free of all restrictions. If Robert were not living at that time, however, the trust was to continue for 20 years, during which time the child or children of Robert (restricted by definition to children by his first and second marriages) were to receive the income for their maintenance and education until reaching 21, and the income outright until 20 years after Robert's death, at which time his children were to receive the corpus in equal shares. The decedent, as settlor, reserved to himself a power of revocation (R. 123-126).

On February 14, 1922, the decedent amended the trust in material respects (Ex. 9, R. 211). Two classes of interests were created, a life interest in Robert and a remainder interest in Robert's children (again restricted by definition to children by his first and second marriages). A life income was to be paid to Robert, and upon Robert's death the corpus was to be held in trust for the children of Robert until 20 years after the latter's death, at which time the trust was to terminate and to be divided among such children in equal shares, or if any child were then dead, its share should go to its testamentary appointees or intestate heirs. If a child

died during Robert's lifetime, such child's share both as to income and principal went to his descendants *per stirpes* upon Robert's death. No descendant could be a beneficiary at any time, however, unless his ancestor, the child of Robert, had died. If no child nor descendants of children survived Robert, the property reverted to decedent-settlor or his estate. The instrument conferred upon Robert's three uncles (the settlor's three brothers) power to increase the income payable to Robert, or to decrease the income, even down to no income at all. The decedent relinquished any powers to revoke the trust, but retained powers to alter and modify and to prescribe and change the prospective shares of the beneficiaries, subject to the restriction that such powers could not be exercised to revoke the trust or "to frustrate the essential purposes of the trust of making provision for the son of the Settlor and his children or descendants" (R. 220-221).

Part IV of the 1922 instrument is as follows (Ex. 9, R. 220-221):

> "Nothing in this instrument contained shall be deemed to affect or limit the power of the Settlor to modify, alter or correct the provisions of the said trust agreement of the 29th day of October, 1917, provided that any such modification, alteration or correction shall not operate to revoke the said agreement or the trust existing thereunder, or to frustrate the essential purposes of the trust of making provisions for the son of the Settlor and his children or descendants, or to impair the substantial integrity of the trust fund, or to create a beneficial interest in or under the trust, on behalf of the Settlor or any person not previously beneficially interested therein or thereunder. The Trustee shall not be required to pass upon the legal effect of any such modification, alteration or correction made by the Settlor, or to determine whether the same is within the power or

authority of the Settlor to make; and by reason of any such modification, alteration or correction made by the Settlor the Trustee shall incur no liability to any person whatsoever. Nor shall anything in this instrument contained be deemed to affect or limit the power of the Settlor, by directions in writing given to the Trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement, postponement or otherwise, of principal or income, or both, of the trust fund; which power of the Settlor is hereby expressly reaffirmed and reserved, together with the power of causing a final distribution to be made at any time to or among the beneficiaries, or any of them, and so terminating the trust."

Under the power to modify, we concede that the decedent could retake from the three uncles the power to increase or decrease Robert's income. But in view of the terms of the trust, it seems reasonably apparent that although the decedent could increase Robert's income up to the full amount of the income of the trust and so deprive Robert's children of the use of current income, the decedent was given no power to reduce the *remainder* for Robert's benefit. The power to revoke was expressly relinquished. The reserved powers to alter the trust could not be exercised in such a way as "to frustrate the essential purposes of the trust of making provision for" Robert, his children and their descendants, or to create new beneficial interests, or to impair the substantial integrity of the trust fund.

If the trust income fell below the fixed amount then annually payable to Robert, the trustee could cure the

insufficiency by a resort to a specific class of items, namely, distributions received on stocks and securities held in the corpus wherever any such distributions had been designated by the payor thereof as a return of capital, in whole or in part. It is probable that this power is meaningless in the light of the foregoing restrictions, but in any event not more than $46,500 was available for such a distribution at the time of death (Ex. 10-a, R. 229), a circumstance going merely to the valuation of the life interest.

The decedent had the power to cause a final distribution to the beneficiaries and so to terminate the trust, but the exercise of this power would merely have had the effect of terminating Robert's life interest and vesting the corpus forthwith in the class composed of Robert's children. The plain import of the trust deed was that there was a line between the life interest and the remainder interest which the decedent could not cross through any of his reserved powers.

Robert was divorced from his first wife and remarried in 1915. Robert had two children by his first marriage, Daniel Guggenheim, II, and M. R. Cordova Guggenheim (hereinafter referred to as Cordova). His child, Daniel, died in 1925 without issue. In 1928 he was divorced from his second wife, by whom he had no children, and remarried the same year (R. 123, 124). Thus, at the time of decedent's death, Robert had only one surviving child of his first and second marriages. The surviving child had no descendants in being at the date of decedent's death. Hence, the class of possible remaindermen was closed at the date of decedent's death.

We maintain that the settlor did not have power to confer upon Robert a share of the remainder. Certainly he could not have conferred upon Robert the entire remainder, for this would have frustrated one of the essential purposes of the trust, namely, to pro-

vide for the children of Robert, as distinguished from Robert himself. If he could confer part only upon Robert, the part which he could not confer was beyond his control. As it happened, at the time of the decedent's death the remainder class was closed, since there was only one child of Robert who was living and entitled to take. The decedent on the date of his death had no power to change the enjoyment of the remainder.

Reasons Why the Writ of Certiorari Should Be Issued.

1. The Circuit Court of Appeals has decided a Federal question in conflict with the decisions of other Circuit Courts of Appeals. We submit that the decision below is in conflict with the decisions of the Circuit Courts of Appeals in *Tait* v. *Safe Deposit and Trust Co. of Baltimore*, 74 F. (2d) 851 (C. C. A. 4th, 1935); *Day* v. *Commissioner*, 92 F. (2d) 179 (C. C. A. 3rd, 1937); and *Commissioner* v. *Flanders*, 111 F. (2d) 117 (C. C. A. 2nd, 1940). Under these cases the value of an interest transferred in trust is not to be included in a decedent-settlor's gross estate under Section 302(d), where the exercise of a reserved power to change or modify a trust instrument is contingent upon the happening of an event, the occurrence of which is uncertain and beyond the control of the settlor. In the case at bar, under the trust agreements and other stipulated facts of record, decedent possessed no power at the date of his death to change the enjoyment of the remainder interest. While the basis of the Circuit Court's decision is not clear, we submit that the result reached, in view of the terms of the trust instruments and the other stipulated facts, is necessarily in conflict with the above cases.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with an applicable decision of this Court. We submit that the decision below conflicts in principle with *Porter* v. *Commissioner*, 288

U. S. 436 (1933). Since the sole surviving remainderman in the instant matter was vested with an interest under the trust deed which was beyond the decedent's power to alter, the death of the decedent had no effect upon the interest which would legally require the inclusion of its value in the gross estate. The decision below, therefore, conflicts with the principle enunciated in the *Porter* case.

3. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari be issued out of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of said Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed with respect to the decision of the issue here presented; and that petitioner be granted such other and further relief as may be proper.

Estate of Daniel Guggenheim, Deceased,
Florence Guggenheim, Executrix,

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Dated, New York, N. Y., June 5, 1941.